

Advisory Opinion

IECDB AO 2010-01

April 29, 2010

Steve Grubbs
Victory Enterprises, Inc.
Via Email

Dear Mr. Grubbs:

This opinion is in response to your meeting with the Board's staff and an email letter of April 8, 2010, requesting an opinion from the Iowa Ethics and Campaign Disclosure Board pursuant to Iowa Code section 68B.32A(12) and Board rule 351—1.2. We note at the outset that the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

FACTUAL STATEMENT:

You advise us that you have ownership interest in Victory Enterprises, Inc., which provides personal consultation for candidates, interest groups, non-profit organizations, and corporations, and VictoryStore.com, which offers customers on-line design and purchase of campaign materials such as bumper stickers, campaign signs, and other promotional products. Customers also have the option to build their own Web sites on-line using templates that you upload. Customers design their own Web sites and your company does not provide any consultative work on the Web sites or products. You frequently have more than 4,000 customer orders per month and you do not have a method of tracking with which campaigns these customers are involved.

QUESTION:

Do the new provisions of Iowa Code section 68A.404 dealing with independent expenditures impact your ability to sell campaign products on-line?

OPINION:

Iowa Code section 68A.404 is the controlling statute governing independent expenditures. That statute was amended effective April 8, 2010, by 2010 Iowa Acts, Senate File 2354. The legislation was in response to the United States Supreme Court

decision that opined, in part, that corporations now have the ability to engage in independent expenditure communications that expressly advocate for or against clearly identified candidates.¹

An “independent expenditure” is defined as being a “communication that expressly advocates the nomination, election, or defeat of a clearly identified candidate or the passage or defeat of a ballot issue that is made without the prior approval or coordination with a candidate, candidate’s committee, or a ballot issue committee.”²

A “coordinated expenditure” is defined in Board rule 351–4.53(4) as meaning the following:

“Made with the knowledge and approval of a candidate or ballot issue committee” means that there has been arrangement, coordination, or direction by the candidate or an agent or officer of the candidate’s committee or a ballot issue committee prior to the procurement or purchase of the good or service, or the publication, distribution, display, or broadcast of an express advocacy communication. This may also be referred to as a “coordinated expenditure.” An expenditure will be presumed to be coordinated when it is:

a. Based on information provided to the expending person by the candidate, the candidate’s committee, or the ballot issue committee with a view toward having an expenditure made; or

b. Made by or through any person who is or has been authorized to raise or expend funds; who is or has been an officer of the candidate’s committee or the ballot issue committee; or who is or has been receiving any form of compensation or reimbursement from the candidate, the candidate’s committee, or the ballot issue committee.”

Iowa Code section 68A.404 was amended by 2010 Iowa Acts, Senate File 2354, by adding new section (7) that contains the following prohibition:

“A person making an independent expenditure shall not engage or retain an advertising firm or consultant that has also been engaged or retained within the prior six months by the candidate, candidate’s committee, or ballot issue committee that is benefited by the independent expenditure.”

The purpose of prohibiting “coordination” is to ensure that independent expenditures are truly “independent” and are not simply vehicles for campaign committees to avoid other campaign finance prohibitions and limitations.³ If a campaign and an independent expenditure effort has “engaged or retained” the same advertising firm or consultant it is more likely that communications were “coordinated” rather than truly “independent expenditures.” The General Assembly expressly sought to prevent this harm by enacting new Iowa Code section 68A.404(7).

In reviewing the language of new Iowa Code section 68A.404(7), the Board is of the opinion that purchasing products via an Internet site is not “engaging or retaining” your company for purposes of the harm the statutory language seeks to prevent. In these situations, your company is not providing specific and individual advice, guidance, instruction, or consultation to the customers. Rather, the customers of VictoryStore.com select and design their own Web sites and the information that is placed on the products they purchase on-line. We do not believe that such activities are “coordination” and thus barred by the new statutory language.

¹ See *Citizens United v. Federal Election Commission*, 558 U.S. ____ (2010).

² See Iowa Code section 68A.404(1) as amended by 2010 Iowa Acts, Senate File 2354, Board rule 351—4.27(1), and Board rule 351—4.53(3).

³ This is particularly relevant in Iowa as Iowa Code section 68A.503 as amended by 2010 Iowa Acts, Senate File 2354 maintained the prohibition on corporations, insurance companies, and financial institutions from making direct contributions to candidates, political parties, and state PACs, but now reflects the *Citizens United* decision that permits such entities to make independent expenditures.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair
Gerald Sullivan
Betsy Roe
John Walsh
Patricia Harper
Saima Zafar

Submitted by: W. Charles Smithson, Board Legal Counsel